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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ALBERT AIMERS,

Plaintiff and Appellant,

v.

iLIVE, INC.,

Defendant and Respondent.

B193313

(Los Angeles County
Super. Ct. No. BC333770)

APPEAL from an order of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Affirmed.

Law Offices of H. Michael Soroy and H. Michael Soroy for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

This is the third appeal in related litigation. In a prior action, Al Moshiri sued Albert Aimers for alleged conduct that arose out of Aimers's position as the nonexecutive chairman of the board of iLive, Inc. (iLive). A default judgment was entered against Aimers as a terminating sanction. He appealed. We affirmed (*Moshiri v. Aimers* (Dec. 23, 2005, B182836) [nonpub. opn.]).

While the prior action was on appeal, Aimers filed this suit against Moshiri and iLive. Against Moshiri, Aimers alleged a cause of action for declaratory relief, seeking to set aside the default judgment on grounds of extrinsic mistake and fraud. Against iLive, he alleged a cause of action for indemnification under Corporations Code section 317 (section 317), seeking monetary relief in the amount of the default judgment.

Moshiri filed successive demurrers. The trial court sustained the second demurrer without leave to amend and entered judgment in Moshiri's favor. Aimers appealed. We reversed (*Aimers v. Moshiri* (Mar. 22, 2007, B191117) [nonpub. opn.]).

iLive, on the other hand, did not file a responsive pleading. A default was entered. Aimers requested a default judgment, attempting to satisfy the requirements of section 317. By order, the trial court denied the request. Aimers's appeal of that order is now before us.

We conclude that section 317 does not permit a separate lawsuit seeking indemnification for a prior judgment. Rather, the statute requires that an officer or director file an application for indemnity in the action in which his or her liability was established. Thus, under section 317, Aimers has to seek relief in the suit brought by Moshiri. We therefore affirm.

I

BACKGROUND

The following allegations and facts are taken from our prior opinion in this case and the evidence submitted in support of Aimers's request for a default judgment against iLive.

A. The Prior Action

On July 20, 2001, Moshiri filed an action against Aimers, iLive, and others (*Moshiri v. Aimers* (Super. Ct. L.A. County, 2001, No. BC254547)). Aimers was the nonexecutive chairman of iLive's board of directors. The action was based on a written

“Finders Agreement” between Moshiri and iLive in which iLive agreed to compensate Moshiri if he raised \$3 million for the corporation by a specified date. The complaint alleged causes of action for breach of the agreement and related torts. The action was assigned to the Honorable Morris B. Jones.

iLive retained Laurence Ring, Esq., to represent Aimers and the corporation. Through Ring, Aimers demurred to the complaint and the first amended complaint. By motion granted on February 5, 2003, Ring was relieved as counsel of record. A notice was sent to Aimers at a company address to inform him of the withdrawal and the dates of the final status conference and the trial. Aimers proceeded without counsel.

A mediation was scheduled for March 31, 2003. Aimers did not appear at the mediation. Nor did Aimers appear at a postmediation status conference.

As a result, the superior court vacated the dates for the final status conference and the trial and issued an order to show cause directing Aimers to appear in court on May 27, 2003, to explain why terminating sanctions should not be imposed. Moshiri, who had earlier served interrogatories and requests for admissions and had received no responses, scheduled discovery motions to be heard on the same date. Aimers did not file an opposition to the order to show cause or the discovery motions. Nor did he appear on May 27. The superior court granted the discovery motions, imposed terminating sanctions, and struck Aimers’s answer for failure to participate in the proceedings. A further order to show cause was issued, directing Aimers to appear in court on July 10 to show cause why a default judgment should not be entered against him.

On August 13, 2003, Moshiri filed and gave notice of a request to enter default and a default judgment in the amount of \$500,000. On August 22, Aimers’s default was entered. A default judgment as requested was entered on October 15. Notice of entry of the judgment was given on October 17, 2003.

On February 18, 2005, Aimers filed a motion to vacate the default judgment. The superior court denied the motion. On appeal, we affirmed (*Moshiri v. Aimers, supra*, , B182836).

B. The Present Action

On May 20, 2005, Aimers filed this action against Moshiri and iLive, alleging two causes of action. The first claim, against Moshiri, sought declaratory relief to vacate the prior default judgment on grounds of extrinsic mistake and fraud. The second claim, against iLive, sought indemnification under section 317 in the amount of the default judgment. The present action was assigned to the Honorable Mary Ann Murphy.

Moshiri filed successive demurrers. The trial court sustained the second demurrer without leave to amend and entered judgment in Moshiri's favor. On appeal, we reversed (*Aimers v. Moshiri, supra*, B191117).

iLive did not appear in the action. A default was entered against it. Aimers filed a request for a default judgment in the amount of \$500,000. He supported the request with a memorandum of points and authorities, his own declaration (which he "supplemented" twice), and exhibits.

The matter was heard on May 23, 2006, and June 20, 2006. At both hearings, the trial court indicated that, under section 317, an officer or director had to request indemnity directly from the corporation before seeking judicial relief. The trial court also commented that Aimers seemed to be making arguments that should have been presented in the prior action. By order dated June 20, 2006, the trial court declined to enter a default judgment on the grounds that "[n]o request to indemnify has been shown. No basis for indemnity has been shown. There are not sufficient facts to support indemnity." Aimers appeals.

II

DISCUSSION

"We review issues of statutory interpretation de novo. . . . The primary purpose of statutory construction is to ascertain the Legislature's intent. . . . We first consider the statutory language, 'being careful to give the statute's words their plain, commonsense meaning.' . . . 'If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary.'" (*California School Employees Assn., Tustin Chapter No. 450 v. Tustin Unified School Dist.* (2007) 148 Cal.App.4th 510, 517, citations omitted.) Further, "[w]e are not bound by the

trial court’s stated reasons for its ruling . . . as we only review the ruling and not its rationale.” (*Rinehart v. Boys & Girls Club of Chula Vista* (2005) 133 Cal.App.4th 419, 429.)

Section 317 provides in relevant part: “(a) For the purposes of this section, ‘agent’ means any person who is or was a director, officer, employee or other agent of the corporation . . . ; ‘*proceeding*’ means any threatened, pending or *completed action* or proceeding, whether *civil*, criminal, administrative or investigative

“(b) A corporation shall have power to indemnify any person *who was or is a party . . . to any proceeding* (other than an action by or in the right of the corporation to procure a judgment in its favor) by reason of the fact that the person is or was an agent of the corporation, *against* expenses, *judgments*, fines, settlements, and other amounts actually and reasonably *incurred in connection with the proceeding* if that person acted in good faith and in a manner the person reasonably believed to be in the best interests of the corporation [¶] . . . [¶]

“(e) [A]ny indemnification under this section shall be made by the corporation only if authorized in the specific case, upon a determination that indemnification of the agent is proper in the circumstances because the agent has met the applicable standard of conduct set forth in subdivision (b) . . . , by any of the following:

“(1) A majority vote of a quorum consisting of directors who are not parties to such proceeding.

“(2) If such a quorum of directors is not obtainable, by independent legal counsel in a written opinion.

“(3) Approval of the shareholders . . . , with the shares owned by the person to be indemnified not being entitled to vote thereon.

“(4) The *court in which the proceeding is or was pending upon application* made by the corporation or *the agent* or the attorney or other person rendering services in connection with the defense” (*Italics added.*)

Aimers argues that he is entitled to indemnification because he met the standard of conduct set forth in section 317, subdivision (b) — that he “acted in good faith and in a

manner [he] reasonably believed to be in the best interests of the corporation.” If, in fact, he met that standard of conduct, the corporation may indemnify him for a judgment incurred in “any proceeding.” But indemnity in those circumstances must be authorized in one of the specified ways: a majority vote of the directors, a written opinion by independent legal counsel, approval by the shareholders, or upon *application* to the *court* in *the proceeding* in which the *judgment was incurred*. Aimers is attempting to pursue the last method.

Under the plain meaning of the statute, Aimers cannot maintain a separate action for indemnification. Rather, he must seek authorization from the court in the prior suit. The statute allows an officer or director to make such an application in a “completed” action in which he or she “was” a party, specifically contemplating a *postjudgment* application for indemnity. In short, “indemnification may be ordered by the court in which a proceeding *against* [an] agent or employee is [or was] pending.” (Friedman, Cal. Practice Guide: Corporations (The Rutter Group 2006) ¶ 6:46, p. 6-12, italics added; see *id.*, ¶ 6:463, p. 6-94.9.)

This interpretation is also supported by common sense. A court that enters a judgment against an officer or director is in a better position to determine whether that individual met the standard of conduct set forth in section 317. If a separate action were permitted, the second court may have to retry the case, resulting in an unnecessary and inefficient use of judicial resources. In this suit, for example, the trial court found it necessary to hold two hearings in an effort to understand the issues involved in the prior action; Aimers thought it necessary to supplement his declaration twice to explain the prior litigation and his role in the underlying events.

We therefore conclude that the trial court properly denied Aimers’s request to enter a default judgment against iLive. Nothing we have said, however, precludes Aimers from seeking relief under section 317 in an appropriate manner.

III
DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

VOGEL, J.

ROTHSCHILD, J.